No. 3543

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

J. A. CZIZEK,

Plaintiff in Error,

vs.

WESTERN UNION TELEGRAPH COMPANY,
a Corporation,

Defendant in Error.

PETITION OF DEFENDANT IN ERROR FOR REHEARING

UPON WRIT OF ERROR FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, SOUTHERN DIVISION

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To the Honorable the United States Circuit Court of Appeals for the Ninth Circuit:

Your petitioner, Western Union Telegraph Company, defendant in error in the above-entitled cause, respectfully petitions this Honorable Court to grant a rehearing in said cause, and as the basis of such petition your petitioner respectfully shows:

1. That this Honorable Court erred in holding that the Act of Congress regulating interstate teleg-

raphy, and the stipulations and agreements made in pursuance thereof, have no application in the case of failure of transmission.

2. That this Honorable Court erred in holding that the *value of the message agreed upon for rate making purposes,* as authorized by the Act of Congress, is void in the case of non-transmission, or that the value of the message agreed upon as a basis of the rate is dependent or conditioned upon partial transmission.

3. That this Honorable Court erred in reviewing the evidence, and finding gross negligence in an action at law, where there was no request for special findings, and no motion for judgment or request for a ruling or declaration of law on the sufficiency of the evidence.

The first two propositions may be discussed together, and in this particular petitioner earnestly contends:

THE CLASSIFICATION OF INTERSTATE MESSAGES WITH RESPECT TO VALUE IS EXPRESSLY AUTHORIZED BY THE ACT OF CONGRESS AND HAS NOW BEEN DECIDED BY THE SUPREME COURT TO BE VALID.

This Honorable Court held that the agreement between the sender of the message and the telegraph company, printed upon the message blank, has no application where the message fails at the originating

office. The decision is based largely upon the following cases:

Postal Tel. Co. v. *Fleischner,* 66 Fed. 899;
Candee v. *W. U. Tel. Co.,* 34 Wis. 471;
U. S. Telegraph Co. v. *Wenger,* 55 Pa. St. 262;
W. U. Telegraph Co. v. *Cook,* 61 Fed. 624;
Swan v. *W. U. Telegraph Co.,* 129 Fed. 318;
Postal Tel. Co. v. *Nichols,* 159 Fed. 643.

We respectfully urge that all of the above cases were decided before the amendment to the Interstate Commerce Act of June 18, 1910, by which Congress took over and occupied the regulation of the entire field of interstate commerce by telegraph, and also before the introduction of the valuation clause into the message contracts *adjusting the rate to the responsibility assumed,* which agreement has no relation to the fact of transmission itself. Prior to the adoption of the amendment to the Interstate Commerce Act and its interpretation by the Supreme Court in the recent case of *Postal Telegraph* v. *Warren Godwin Lumber Co.,* referred to in the opinion of the Court, there was much conflict among the various State Courts, and also among the Federal circuits as to the effect of the unrepeated message clause of the contract in cases where there was no mistake in verbiage, but where the message failed in transmission or delivery. The authorities above cited are the ones which were usually relied upon as holding that the

condition of the message contract was void. "On the other hand," as stated by the Interstate Commerce Commission in *Cultra* v. *Western Union Tel. Co.,* 44 I. C. C. Rep. 670, "the defendant cites an equal number of cases in which courts of great authority have upheld the restrictive rates." It is this lack of uniformity, says the Commission, which explains "the legislation by which the Congress has put *all telegraph and telephone companies engaged in interstate transmission of messages under our jurisdiction.*"

Then says the Commission:

> "But whatever may have occasioned the amendatory legislation, one of its necessary consequences, under the language used, has been to put an end to this diversity in results; so that, as will be seen further along in this report, the charge as fixed and offered to the public by the defendant for transmitting an interstate message may no longer involve any greater or less liability in one forum than it does in another, but must be construed as attaching to the defendant's error the same degree of responsibility in all the courts."

In *Western Union* v. *Lange,* this Court approved the former line of authorities and held that the unrepeated message clause applied only to errors in transmission. (There was no valuation agreement involved in that case as that clause *was* not introduced into the contract until after the Act of Congress.) Upon this conflict in authorities concerning the unrepeated message clause, the Supreme Court granted the certiorari in *Western Union* v. *Lange,* and while

the point was not decided in that case it was determined in the *Warren Godwin* case, *supra,* decided at the same term, in which the Court held that the different rates were not fixed as a basis alone for the service rendered, *but for the responsibility exacted for its performance.*

This Court, in its opinion in the present case, refers to "the absence of a controlling decision." We respectfully urge that the controlling decision is found in the *Warren Godwin Lumber* case, *supra,* and in the cases expressly approved therein. The Court there was not only reviewing the decision of the Supreme Court of Mississippi in that particular case, but also the decision of the same Court in *Dickerson* v. *Western Union Tel. Co.,* 114 Miss. 115, in which the Postal Telegraph Co. was also a defendant. In that case there was no error in transmission, but the message failed of prompt delivery, and the Postal Telegraph Co., the other defendant, *had rendered no service whatever* other than receiving the message. The complaint also charged gross and willful and wanton negligence. The Supreme Court of Mississippi, as said by Chief Justice White, "held that the Act of Congress of 1910 had not extended the power of Congress over the rates of telegraph companies for interstate business *and the contracts made by them as to such subject.*" The Supreme Court of the United States in reversing this holding, says:

> "For the sake of brevity we do not stop to review the cases which perturbed the mind of the

> Court in the *Dickerson* case as to the correctness of its ruling in the *Showers* case (citing cases), but content ourselves with saying that we are of the opinion that the effect so given to them was a mistaken one."

The case of *Norris* v. *Western Union Tel. Co.*, 174 N. C. 92, which is among the cases expressly approved in the *Warren Godwin* case and on which the Court in part bases its opinion, was a case of *failure to deliver*. The Supreme Court in the *Warren Godwin* case did not undertake to specify the particular cases in which the message contracts applied, but in effect held that Congress by the Act of 1910 has occupied the *entire field* and extended the power of Congress over the rates of telegraph companies for all interstate business and all contracts made by them as to such subject, and has vested the power to determine the reasonableness of the *rates, rules, contracts and practices* of such interstate telegraph companies in the first instance in the Interstate Commerce Commission.

THE VALUATION CLAUSE IN THE MESSAGE CONTRACT

The above relates to the unrepeated message clause of the contract, but we repeat here the *valuation clause* used and agreed upon by the parties *for rate-making purposes:*

> "2. In any event the company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the non-delivery, of this telegram, whether caused by the

We respectfully call the Court's attention to the following authorities omitted from our petition for rehearing. They hold that the fifty dollar valuation clause is valid, notwithstanding gross negligence.

Frederick v. Western Union Tel.Co., 179 N.W. 934,
Donlon Bros. v.Southern Pacific Co., 151 Cal. 763(See pages 766-770.
Dunhan v.Western Union Tel.Co., 102 S.E. 113,
Western Union v. Albert,86 So. 760,
Klotz v. Western Union,175 N.W.825.

In the Frederick case there was failure of delivery and gross negligence. In the opinion based upon the recent Federal authorities the Court said, page 936:

"Where the telegraph company is grossly negligent it may be made to respond for such negligence beyond the price of sending the telegram but not to exceed $50."

also (page 936) that it is

"settled that it cannot be urged collaterally that such provisions are unreasonable and that such attack must be done by direct proceedings before the Interstate Commerce Commission."

> negligence of its servants or otherwise, beyond the sum of Fifty Dollars, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent thereof."

The above provision of the contract has no relation to the *degree* of negligence nor to the place where the negligent act occurred. On the contrary, it assumes the fact of negligence. This clause was not involved in any of the decisions cited by the Court in its opinion in this case and referred to in the beginning of this petition. Those cases, as stated, were decided before the Act of Congress was amended in 1910 and before there was any valuation clause in the contract. The clause is expressly authorized by the Act of Congress wherein it is provided that telegraph messages may be classified into *repeated* and *unrepeated messages,* etc., *"and such other classes as are just and reasonable,* and different rates may be charged for the different classes of messages." This particular form of valuation clause of the contract was held to be reasonable and valid by the Interstate Commerce Commission in *Cultra* v. *Western Union Tel. Co.,* 44 I. C. C. Rep. 670, in *Bailey* v. *Western Union Tel. Co.,* 97 Kan. 619, and *Western Union Tel. Co.* v. *Schade,* 137 Tenn. 214, which decisions were expressly approved by the Supreme Court in the *Warren Godwin* case, *supra.* The liability of the telegraph

company in this case, as in all cases, attached not when the message was placed upon the wire for transmission *but when the message was filed and the contract was made.* Upon a review of the decision of the Supreme Court in the *Warren Godwin* case, and in *Western Union* v. *Boegli,* 251 U. S. 315, and of the various State Court decisions approved therein, we can see no escape from this conclusion. Otherwise the power of Congress has not been extended over the entire field of interstate commerce by telegraph, and it has not been wholly placed under the administrative control of the Interstate Commerce Commission as the Supreme Court says in the two cases above referred to is so clearly established.

THE MEASURE OF DEFENDANT'S LIABILITY UNDER THE VALUATION CLAUSE OF THE CONTRACT IS BASED UPON THE RATE PAID AND BECOMES FIXED WHEN THE CONTRACT IS MADE.

In the *Cultra* case, the Interstate Commerce Commission bases its opinion largely upon the "Express Cases" construing similar contracts. It says:

> "The sender of a telegram occupies much the same position as the consignor of any express package. In neither case is the value of that which is offered for transmission or transportation known to the carrier. In the case of a telegram, if the carrier is to assume the same degree of risk that is assumed by the express company under similar circumstances, the rate demanded is the repeated message rate, under which the liability of the carrier is limited to the sum of

$50, unless a greater value is declared. For a greater value an additional charge must be paid. The same limitation of value is observed in the form of express receipt prescribed in *Express Rates, Practices, Acccounts,* and *Revenues,* 28 I. C. C., 132, 137, where it is said:

"'The classification prescribed provides for valuation charges upon articles of higher value. In the case of shipments of extraordinary value, not only is the carrier entitled to notice of such value in order that its care may be increased, but it is also entitled to extra compensation for the increased liability and care.'

"As before stated, the charge established by the defendant for the transmission of messages valued at more than $50 is one-tenth of 1 per cent of the excess value in addition to the repeated message rate. This special charge is the same as that found reasonable by us for a like liability in the transportation of express packages, and is the usual insurance charge on shipments conveyed by parcel-carrying systems in other countries. *In re Express Rates, Practices, Accounts* and *Revenues,* 24 I. C. C., 380, 397."

THE RULE IN RAILROAD AND EXPRESS CASES ARE THE SAME AS WITH TELEGRAPH COMPANIES IN INTERSTATE BUSINESS

The Supreme Court has held a similar valuation clause valid in all the recent cases relating to express companies and railroads. The principal cases are:

Adams Express Co. v. *Croninger;* 226 U. S. 491
Kansas City v. *Carl;* 227 U. S. 639
Missouri Ry. v. *Harriman;* 227 U. S. 657
Wells Fargo v. *Neiman-Marcus Co.* 227 U. S. 469

In all these cases it is held that the shipper is limited in the case of the loss of the goods to the value declared as a basis of rates without regard to the place where the negligent act occurred. The Supreme Court in its approval of the *Cultra* case has applied this doctrine to telegraph companies. *Adams Express Co.* v. *Croninger, supra,* is the first and leading case on the subject, and will be found cited and approved at almost every term of court since it was decided in 1912. There the action was to recover the full market value of a package containing a diamond ring, which was delivered by the plaintiff below to the express company at its office in Cincinnati, Ohio, consigned to Augusta, Georgia.

"The package was never delivered." The Court does not inquire whether the ring was lost at Cincinnati, Ohio, or at Augusta, Georgia, or at some intervening point. It simply holds that the contract declaring the value of the property fixed upon as a basis of the rate is valid, and determined the measure of damage in case the package was never delivered. In that case the valuation was $50. The clause of the contract was in substance the same as the contract here. Inasmuch as it is not dependent upon service, but is an agreement as to value in case the property is lost, it was immaterial to the case what was the degree of negligence or whether the package was lost at the *originating point or the point of destination.*

We respectfully call the Court's attention to the

following paragraphs of the opinion which we contend are controlling:

> "It has therefore become an established rule of the common law, as declared by this Court in many cases, that such a carrier may, by a fair, open, just and reasonable agreement, limit the amount recoverable by a shipper *in case of loss or damage to an agreed value, made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of the risk.*"
>
> . . . . . .
>
> "The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. *The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation,* between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practised on the shipper, should be upheld. There is no violation of public policy. *On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss.*"

In *Wells Fargo* v. *Neiman-Marcus Co.*, 227 U. S., the action was to recover from the express company

the loss of a package of furs "shipped from New York to Dallas, Texas, *and never delivered.*" The agreement as to value in case of loss was substantially the same as in this case. The Court determines that in the case of loss the shipper is held to that declared value. The Court said:

> "The rate of freight was based upon the valuation thus fixed, and the liability should not exceed the amount so made the rate basis."

Upon this holding the judgment was reversed. There is no discussion as to whether the package was lost at the receiving office or at some intermediate point.

In the present case the agreement is that the value of the message does not exceed $50, and the company shall not be liable beyond that sum in case of *non-delivery.* The message was never delivered. Its value could not be affected by the fact that it failed at one office instead of another. It is further agreed that for any additional value or risk which the telegraph company assumes, the sender of the message shall pay a sum on such value "equal to one-tenth of one per cent thereof." On the claimed value of $4500, therefore, the additional rate which any user of the telegraph would have been required to pay under the rules established in accordance with the Act of Congress was $4.50. The sender of the message did not pay this rate, but paid the lower rate, yet plaintiff claims the same value as one who had paid the full

rate. We earnestly contend that the decision of the Court *destroys the uniformity which it was the purpose of the Interstate Commerce Act to establish.*

AFTER THE SENDER HAS DECLARED THE VALUE IN ORDER TO SECURE THE RATE WHICH CORRESPONDS THERETO THAT VALUE CANNOT BE AFFECTED BY SHOWING THAT THE NEGLIGENT ACT OCCURRED AT THE INITIAL POINT.

We invite the Court's attention to this situation to show that after the message was filed and the value agreed upon in case of loss and the rate fixed in accordance with the measure of liability thus assumed, it is immaterial whether the message failed at the originating office or the office of destination or at some intervening point. Assume that at the time this message was filed at Boise to be transmitted to Oakland, a similar message was filed at Oakland to be transmitted to Boise, and that the latter message *was* transmitted to Boise and both messages there came into the possession of the same clerk and through his negligence, gross or otherwise, both messages were misplaced and lost, each message having been valued at fifty dollars and both senders having paid the same toll. Can the Court consistently with the purpose of the Act of Congress to establish uniformity of rates for the same degree of responsibility as stated by the Supreme Court in the *Warren Godwin* case and by the Interstate Commerce Commission in the *Cultra* case, hold that the

company would be liable for a greater sum than the declared value in one case and not the other, although the negligence in each case was the same act?

WE EARNESTLY CONTEND:

1. That under the valuation clause of the contract the liability of the company to the extent of the value declared in case of loss attaches when the message is filed and the contract is made; that if the message is never delivered it is immaterial to the sender at what point on the company's lines the failure occurred.

2. That this contract fixing a value upon the message is not a limitation of liability, but is a classification of messages for rate making purposes, under which the sender, having secured the lower rate, is stopped from seeking to recover more than the declared value of his message.

3. That if one user of the telegraph, on account of larger declared value, pays $4.50 more than another user pays for the same message and the higher responsibility assumed, and yet in the event of loss for any reason or at any place, both senders are permitted to recover the same high value, there is a discrimination between the two and the violation of the express terms of the Interstate Commerce Act.

4. That a telegram or a package to be transmitted from one State to another is in interstate com-

merce and subject to the regulation of the Interstate Commission as soon as it is filed with the carrier and contract of transmission or bill of lading is made. If the contract respecting the value of the message in suit here, though valid, has no application in the present case, then some messages filed in interstate commerce are controlled by the Act of Congress and the regulations of the Interstate Commission, and some messages are not. We respectfully urge that the decision of the Court in this respect is erroneous.

THE AUTHORITY TO DETERMINE THE REASONABLENESS AND APPLICATION OF ALL REGULATIONS AFFECTING INTERSTATE TELEGRAMS HAS BEEN VESTED BY THE ACT OF CONGRESS IN THE INTERSTATE COMMERCE COMMISSION.

The Court here held that this contract is invalid in case of failure of transmission. It must, however, be admitted that the language of the contract is sufficiently comprehensive to cover this case, for it provides that where the rate is such as was paid for the message involved, the company in case of non-delivery shall not be liable beyond the declared value of fifty dollars, which corresponds to that rate. The message, through the negligence of the defendant, was not delivered. The company was therefore liable for the declared value. But, says the Court, the contract is unreasonable and against public policy when

sought to be applied to cases of total failure of transmission. We contend it is not competent for the Court to so determine the unreasonableness of the regulation. It will be remembered the Supreme Court expressly approved the case of

Gardner v. *Western Union Tel. Co.*, 231 Fed.

where it is said, page 412:

> "Whether the regulation is a reasonable one or not, is, in our judgment, a question for the Interstate Commerce Commission to determine."

(Citing numerous decisions of the Supreme Court.)

In *Williams* v. *Western Union Tel. Co.*, 203 Fed. 140, the Court said (page 145):

> "The question (the reasonableness of the regulation) must be first raised before the Interstate Commerce Commission."

We refer the Court on this point to our former Brief, at pages 57-61.

THE SIXTY-DAY CLAUSE OF THE MESSAGE BLANK.

In holding that the written stipulations upon the back of the telegraph message blank do not apply in case of total failure of the transmission the Court would seem to have overlooked the provision of paragraph 6 on the telegraph blank, which is as follows:

> "The company will not be liable for damages or statutory penalties *in any case* where the claim

> is not presented *in writing* within sixty days after the telegram is filed with the company for transmission."

This clause in its terms applies to all cases, or, as its language specifies, in any case. It has been held to be valid by the Interstate Commerce Commission, the Federal Courts and the Supreme Court. See

Gardner v. *Western Union Tel. Co.*, 231 Fed. 405,

approved in *Postal Tel. Co.* v. *Warren Godwin Lumber Co.*, 251 U. S. 27. See also our former Brief pages 62-70. Under these authorities the sixty-day clause applies in cases of failure to transmit and in cases of gross negligence, and as it is conceded that notice in writing of the claim was not given, the judgment should have been affirmed upon this ground.

THE COURT ERRED IN REVIEWING THE EVIDENCE.

Respecting this third basis of this petition for rehearing your petitioner respectfully shows:

1. That this Honorable Court erred in reversing the Trial Court and ordering a new trial for *errors in fact.*

2. That this Honorable Court erred in *reviewing the evidence* and holding the same *insufficient* to support the general finding in favor of defendant in error.

3. That this Honorable Court apparently overlooked the fact that this was an action at law tried by the Court and that no request for special findings, no motion for a judgment, and no request for a ruling or declaration of law upon the sufficiency of the evidence was made in the Trial Court by either party, but this Court examined and determined the case as if such a motion or request had been made and as if the Court was free to determine from the whole evidence whether or not it sustained the general finding and judgment in favor of defendant in error.

4. That this Honorable Court erred in treating the statements in the opinion of the Trial Court filed in this case and contained in the Transcript as special findings of fact.

5. That this Honorable Court erred in holding and deciding, notwithstanding the general finding in favor of this plaintiff and the absence of any motion for judgment or similar motion or request, that the evidence was *sufficient* to show a case of *gross negligence* against your petitioner for failure to transmit and deliver the telegram involved in this action.

6. That this Honorable Court erred in holding and deciding, notwithstanding the general finding in favor of your petitioner, and in the absence of any motion for judgment or similar motion or request, that the *evidence was sufficient* to sustain the contention of plaintiff in error that he would have sold the bank stock mentioned in the telegram if he had re-

ceived the message, and that he would have received the price mentioned therein for such stock.

7. That this Honorable Court apparently overlooked the fact that under the issues raised by the pleadings and in view of the general finding in favor of your petitioner, that the holding of the Trial Court that *plaintiff in error had not shown that he could and would have delivered his stock,* which was pledged in an Oakland bank as collateral, *was sufficient to sustain the judgment.*

8. That this Honorable Court erred in holding and deciding, notwithstanding the general finding in favor of your petitioner and in the absence of any motion for judgment or similar motion or request, that plaintiff in error suffered any damage for your petitioner's failure to transmit and deliver the telegram in question.

9. That this Honorable Court apparently assumed that the time for preparation of a bill of exceptions in said cause had not expired on June 5, 1920, when petition for new trial by plaintiff in error was filed, and on June 17, 1920, when the order extending the time for preparing such bill of exceptions to July 8, 1920, was made.

10. That this Honorable Court erred in holding and deciding that the clause of the contract of transmission requiring notice of claim within sixty days from the filing of the message for transmission did

not apply in cases where the telegram was not transmitted at all.

ARGUMENT

This was a law action tried by the Court without a jury, pursuant to written stipulation of the parties (Tr., page 55). There are no special findings, but the judgment contains the following:

> "The Court having heard the evidence, oral and documentary, introduced by the respective parties, and being fully advised in the premises, finds, concludes and decides in favor of defendant" (Tr., p. 43).

There was no motion for judgment by either party during the trial or at any time, no request for a declaration of law, and no other motion or request bringing before the Trial Court the sufficiency of the evidence, but nevertheless *this Court has reviewed the evidence fully, passed upon its sufficiency as if such a motion or request had been made, and reversed the judgment below on the ground that the evidence was sufficient to show gross negligence* on the part of defendant in error, that plaintiff in error would have sold his stock if he had received the telegram, and that he would have received the price mentioned in the telegram for such stock.

In passing upon the sufficiency of the evidence in this state of the record, without mentioning the fundamental rules of practice laid down by the Federal Statutes and a long line of decisions in the Supreme

Court of the United States and the Circuit Courts of Appeal of the various circuits, including this Court, we are forced to the conclusion that this Court overlooked the points raised in the Brief of defendant in error at pages 11 and 12 and 38-42 inclusive, and assumed that there was some motion or request calling for a declaration or ruling from the Trial Court as to the sufficiency of the evidence which was contained in the bill of exceptions. There was no such request or motion made at the trial and the bill of exceptions shows conclusively this fact, and nothing is clearer than that a Federal Appellate Court cannot review the evidence in an action tried by the Court and reverse the lower Court because it considers such evidence insufficient to support a general finding in favor of the defendant in error.

Section 1011 of the United States Revised Statutes originally enacted in the Judiciary Act of 1789, provides as follows:

> "There shall be no reversal in the Supreme Court or in a Circuit Court upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the Court, *or for any error in fact.*"

Under the Circuit Court of Appeals Act this section applies to the Circuit Courts of Appeal. See

Hall v. *Houghton etc. Merc. Co.,* 8 C. C. A. 661, 60 Fed. 350;

United States Fidelity etc. Co. v. *Woodson County,* 76 C. C. A. 114, 145 Fed. 144.

In *Pennsylvania Casualty Company* v. *Whiteway*, 127 C. C. A. 332, 210 Fed. 782, and at page 784, this Court said:

> "When an action at law is tried before a jury, their verdict is not subject to review unless there is absence of substantial evidence to sustain it, and even then it is not reviewable unless a request has been made for a peremptory instruction, and an exception taken to the ruling of the Court. When a jury is waived, and the cause is tried by the Court, the general finding of the Court for one or the other of the parties stands as the verdict of a jury, and may not be reviewed in an Appellate Court unless the lack of evidence to sustain the finding has been suggested by a request for a ruling thereon, or a motion for judgment, or some motion to present to the Court the issue of law so involved, before the close of the trial. *Martinton* v. *Fairbanks*, 112 U. S. 670, 5 Sup. Ct. 321, 28 L. Ed. 862; *Wilson* v. *Merchants' Loan & Trust Co.*, 183 U. S. 121, 22 Sup. Ct. 55, 46 L. Ed. 113; *Boardman* v. *Toffey*, 117 U. S. 271, 6 Sup. Ct. 734, 29 L. Ed. 898; *Barnard* v. *Randle*, 110 Fed. 906, 49 C. C. A. 177; *United States Fidelity & G. Co.* v. *Board of Com'rs*, 145 Fed. 144, 76 C. C. A. 114; *Felker* v. *First Nat. Bank*, 196 Fed. 200, 116 C. C. A. 32; *Bell* v. *Union Pac. R. Co.*, 194 Fed. 366, 114 C. C. A. 326. There was no such request or motion made in the case in hand, and the judgment of the Court below is therefore conclusive of the facts determined thereby."

In *Wear* v. *Imperial Window Glass Co.*, 139 C. C. A. 622, 224 Fed. 60, the Circuit Court of Appeals for the Eighth Circuit, speaking through Judge Sanborn, said at pages 62 and 63:

"This case was argued and submitted on the supposition that there were exceptions to rulings of the Court below upon questions of law and an assignment of errors which presented some legal question to this Court for review, but a reading of the record and the briefs subsequently disclosed the fact that this was a mistake. The only question the specifications of error attempt to present is whether or not the evidence, which is conflicting, sustains the finding and judgment of the Court. They invite this Court, in other words, to retry this case and to determine whether or not under the applicable law the weight of the evidence sustains the finding and judgment. But the case was tried by the Court below without a jury, and its decision of that issue is not reviewable in this Court. It is, like the verdict of a jury, assailable only on the ground that there was no substantial evidence in support of it, and then it is reviewable only when a request has been made to the Trial Court before the close of the trial that it adjudge, on the specific ground that there was no substantial evidence to sustain any other conclusion, either all the issues or some specific issue in favor of the requesting party. No such request was made in this case and the specifications of error, therefore, present no question reviewable by this Court. When an action at law is tried without a jury by a Federal Court, and it makes a general finding, or a special finding of facts, the Act of Congress forbids a reversal by the Appellate Court of that finding, or the judgment thereon, 'for any error of fact' (Revised Statutes, Sec. 1011, U. S. Comp. Stat. 1913, Sec. 1672, p. 700), and a finding of fact contrary to the weight of the evidence is an error of fact.

"The question of law whether or not there was any substantial evidence to sustain any such find-

ing is reviewable, as in a trial by jury, only when a request or a motion is made, denied and excepted to, or some other like action is taken which fairly presents that question to the Trial Court and secures its ruling thereon during the trial."

In the case of *Dooley* v. *Pease,* 180 U. S. 126, 45 L. Ed. 457, at page 460, the Court states:

"Where a case is tried by the Court, a jury having been waived, its findings upon questions of fact are conclusive in the Courts of Review, it matters not how convincing the argument that upon the evidence the finding should have been different."

Under the original Judiciary Act no review whatever was provided in cases tried before a Federal Court by agreement, and this point was taken care of by Section 4 of the Act of March 3d, 1865, now contained in sections 649 and 700 of the Revised Statutes, which, however, did not repeal section 1011, *supra.* Section 649 is as follows:

"Issues of fact in civil cases in any Circuit Court may be tried and determined by the Court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the Court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

Section 700 Revised Statutes is as follows:

"When an issue of fact in any civil cause in a Circuit Court is tried and determined by the Court

> without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the Court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and *when the finding is special* the review may extend to the determination of the sufficiency of the facts found to support the judgment."

The purpose of these sections is admirably stated by the Supreme Court in the case of *Martinton* v. *Fairbanks,* 112 U. S. 670, 676, 28 L. Ed. 862, where the Court, after fully reviewing the authorities, says at page 864:

> "The 4th section of the Act of March 3, 1865, was passed to allow the parties, where, a jury being waived, the cause was tried by the Court, a review of such rulings of the Court in the progress of the trial as were excepted to at the time and duly presented by bill of exceptions; and also a review of the judgment of the Court upon the question whether the facts specially found by the Court were sufficient to support its judgment. In other respects the old law remained unchanged. In the present case, the bill of exceptions presents no ruling of the Court made in the progress of the trial, and there is no special finding of facts. The general finding is conclusive of the issues of fact against the plaintiff in error, and there is no question of law presented by the record of which the Court can take cognizance."

In *United States Fidelity etc. Co.* v. *Woodson County,* 76 C. C. A. 114, 145 Fed. 144, the Circuit

Court of Appeals for the Eighth Circuit, at pages 150 and 151, said:

> "The acts of Congress provide that 'there shall be no reversal in the Supreme Court upon a writ of error . . . for any error in fact' (Rev. St. Sec. 1011 (U. S. Comp. St. 1901, p. 715)); and this provision of the statute governs the Circuit Court of Appeals (*Hall* v. *Houghton, etc., Co.*, 60 Fed. 350, 8 C. C. A. 661).
>
> *"In the trial of an action by the Court without a jury the rulings of the Court in the progress of the trial, and those only, are open to review.* The true test for determining whether or not a question or ruling in a trial by the Court without a jury is reviewable is the answer to the question whether or not it would have been open to review if the trial had been to a jury.
>
> "The question whether or not at the close of a trial there is substantial evidence to sustain a finding in favor of a party to the action is a question of law which arises in the progress of the trial. In a trial to a jury it is reviewable on an exception to a ruling upon a request for a peremptory instruction. *In a trial by the Court without a jury it is reviewable upon a motion for a judgment, a request for a declaration of law, or any other action in the Trial Court which fairly presents this issue of law to that Court for determination before the trial ends.*
>
> "No motion, request or act of this nature is recorded in the case in hand, so that the question of the sufficiency of the evidence to sustain the finding and judgment is not open for consideration in this Court.
>
> "The finding of the Court was general and was in favor of the defendant. Like a verdict

of a jury it concludes all issues of fact and all mixed questions of fact and law save the questions of law reserved by demurrer, motion, request, or exception. No questions of law were reserved which have not been considered and decided.

"The judgment below must, therefore, be affirmed, and it is so ordered." (Our italics.)

In *Pabst Brewing Company* v. *E. Clemens Horst Co.*, 264 Fed. 909, at page 911, this Court makes the following statement:

"The principal errors relied upon pertain to the insufficiency of the evidence to support the findings of the District Court. The record fails to show that any request was made by the Pabst Company for findings, and at no time during the trial, or at the close thereof, did counsel for the plaintiff in error ask the District Court to adjudge that the evidence was insufficient to support any finding. The record also fails to show that the Court ruled upon any such points, or that an exception was taken by the plaintiff in error to any ruling upon the omission of the Court to make findings at the request of the plaintiff in error. In *Dangberg Land & Live Stock Co.* v. *Day*, 247 Fed. 477, 159 C. C. A. 531, where a jury trial was waived and special findings of fact were made in favor of the defendants, and where at the close of the testimony plaintiff in error made no request for a finding in its favor on the issues, and made no motion or request presenting to the Trial Court the question of law whether there was substantial evidence to sustain findings for the defendant, this Court held that the sufficiency of the evidence to support the findings was not open to review in the Court of Appeals."

In *H. F. Dangberg etc. Co.* v. *Day,* 159 C. C. A., 531, 247 Fed. 477, at page 478, the Court says:

> "At the close of the testimony there was no request by the plaintiff in error for a finding in its favor on the issues, and by no motion or request did it present to the Trial Court the question of law whether there was substantial evidence to support the findings, therefore is not open to review in this Court."

In *Societe Nouvelle etc.* v. *Barnaby,* 158 C. C. A. 294, 246 Fed. 68 and at page 71 this Court states:

> *"Where the issues of fact are submitted to the Court and the finding is general, nothing is open to the review of the losing party except the rulings of the Court in the progress of the trial, in which is not included the general finding of the Court, nor the conclusion embodied in such general finding. Insurance Co.* v. *Folsom,* 18 Wall 237, 248, 21 L. Ed. 827; *Cooper* v. *Omohundro,* 19 Wall 65, 69, 22 L. Ed. 47.
>
> "'Only rulings upon matters of law, when properly presented in a bill of exceptions,' says the Court in *Stanley* v. *Supervisors of Albany,* 121 U. S. 535, 547, 7 Sup. Ct. 1234, 1238, 30 L. Ed 1000, 'can be considered here, in addition to the question, when the findings are special, whether the facts found are sufficient to sustain the judgment.'
>
> "And it has been expressly held that, where the only matter presented by the bill of exceptions which the Court is asked to review arises upon an exception to the general finding of the Court upon the evidence adduced at the trial, no law is presented which the Court can review.

Martinton v. *Fairbanks,* 112 U. S. 670, 5 Sup. Ct. 321, 28 L. Ed. 862.

"*Such is the interpretation of the statute.*" (Our italics.)

The only exception in the present case to any ruling upon the sufficiency of the evidence is that found at page 112 of the Transcript to the general finding, and as stated by this Court in the above case, such an exception presents no question for review.

Plaintiff in error in his bill of exceptions tried to avoid the above rule by treating certain statements in the opinion of the Court as special findings of fact, but special findings can only be examined for the purpose of determining whether or not they support the judgment entered, and in any event the opinion of the Trial Court cannot be referred to for the purpose of determining what facts the trial court found when such Court has made a general finding.

In *British Queen Min. Co.* v. *Baker Silver Min.* Co., 139 U. S. 199, 35 L. Ed. 147, the Court says:

> "The record contains a bill of exceptions, but no exceptions to the rulings of the Court in the progress of the trial of the cause were thereby duly presented, and, although after reciting the evidence, it is therein stated that 'the Court thereafter and during the said term made the following findings of fact and judgment thereon', which is followed by an opinion of the Court assigning reasons for its conclusions, this cannot be treated as a special finding enabling us to determine whether the facts found support the judgment, nor can the general finding be disregarded."

In *Dickenson* v. *Planters Bank,* 83 U. S. 250, 21 L. Ed. 278, the record was similar to that in the present case and the Court declares:

> "It is, however, only when the finding is special that the review of this Court can extend to the determination of the sufficiency of the facts found to support the judgment. Here the record as returned contains what is stated to have been all the evidence in the cause, but the Court has not found what the evidence proves nor any other facts except that stated in the judgment. * * * Some facts, indeed, are stated in the opinion of the Court that seems to have accompanied the judgment, but they are not stated as a special finding. * * * We cannot, therefore, inquire whether the evidence as delivered by the witness was sufficient under the circumstances * * * but though the finding was general, any ruling of the Court in the progress of the trial if excepted to at the time and duly presented by bills of exceptions may be reviewed by us."

The propositions above urged were clearly summarized by Judge Gilbert in the recent case in this Court of *Northern Idaho and Montana Power Co.* v. *A. L. Jordan Lumber Co.* (C. C. A. 9th Ct.) 262 Fed. 765 at page 766 in the following words:

> "On the trial no exceptions were taken to any ruling of the Court, and no request was made for special findings, or for a finding in favor of the defendant in the action. *The plaintiff in error refers to the opinion of the Court below as containing special findings of fact, but the opinion cannot be resorted to for that purpose. Dickinson* v. *Planters Bank,* 16 Wall 257, 21 L. Ed. 278;

British Queen Min. Co. v. *Baker Silver Min. Co.*, 139 U. S. 222, 11 Sup. Ct. 523, 35 L. Ed. 147; *Saltonstall* v. *Birtwell*, 150 U. S. 417, 14 Sup. Ct. 169, 37 L. Ed. 1128; *York* v. *Washburn*, 129 Fed. 564, 64 C. C. A. 132; *Hayden* v. *Ogden Savings Bank*, 138 Fed. 91, 85 C. C. A. 558; *United States* v. *Sioux City Stock Yards Co.*, 167 Fed. 127, 92 C. C. A. 518; *Gibson* v. *Luther*, 196 Fed. 203, 116 C. C. A. 35.

"In the absence of a special finding, the judgment must be affirmed, unless the complaint fails to state a cause of action, or the bill of exceptions presents some erroneous ruling of the Court in the progress of the trial. *Norris* v. *Jackson*, 9 Wall 125, 19 L. Ed. 608. *There being in the present case no ruling of the trial court, and no special finding of fact, but only a general finding, the latter must be accepted as conclusive, and this Court can go no further than to affirm the judgment. Lehnen* v. *Dickson*, 148 U. S. 71, 13 Sup. Ct. 481, 37 L. Ed. 373; *Dunsmuir* v. *Scott*, 217 Fed. 200, 133 C. C. A. 194; *Pennsylvania Casualty Co.* v. *Whiteway*, 210 Fed. 782, 127 C. C. A. 332." (Our italics.)

UNDER THE ABOVE AUTHORITIES THE FOLLOWING WELL-ESTABLISHED PRINCIPLES CONTROL THE SCOPE OF THE REVIEW BY THIS COURT IN THE CASE AT BAR:

1. There can be no reversal for errors of the Trial Court on questions of fact or of mixed law and fact.

2. This Court cannot review the evidence and determine whether or not it is sufficient to show gross negligence or that plaintiff in error would have sold his stock and received the price stated in

the telegram therefor, if such telegram had been delivered promptly, or whether or not he suffered actual damage because there was no motion or request for a judgment or for a declaration of law, which would be equivalent to a motion for a peremptory instruction in a case tried before a jury.

3. The exception to the general finding in favor of your petitioner presents no question to this Court for review.

4. This Court is not at liberty to treat the statements in the Trial Court's opinion as special findings of fact, and in the absence of special findings it is not open to this Court to reverse the Trial Court on the ground that the facts assumed to have been found by such Court do not support the judgment.

5. This Court having reversed the judgment not for any errors of law occurring at the trial, and duly excepted to, but having reversed it upon the ground that the evidence was insufficient to support the general finding, or, in other words, for errors in fact, a rehearing should be granted and the judgment affirmed.

Several other questions are raised by the petition for rehearing which we will discuss briefly. The first relates to the bill of exceptions. Upon motion in the Trial Court a portion of the bill of exceptions was stricken out and the balance retained. Plaintiff in error excepted to the action in striking out a

portion of the bill and assigned error thereon, and on this point this Court decided against him. Your petitioner, however, not having sued out a writ of error from the decision below did not attack the action of the Trial Court in this regard, but filed a motion in this Court to strike out the entire bill of exceptions upon the ground that it was not seasonably settled and allowed. In its opinion this Court refers solely to the action of the Trial Court in declining to settle the balance of the bill of exceptions and apparently overlooked the motion filed in this Court. It also appears from the opinion herein that this Court assumed that the time for presenting such bill of exceptions for settlement had been regularly extended to July 8th, 1920, and this being within the term at which the judgment was entered, it was held to be sufficient. The facts, however, are otherwise. The judgment was entered and notice thereof served upon May 8th, 1920. The time for presenting a bill of exceptions expired under Rule 76 of the Trial Court, set out in the bill of exceptions, May 18th, 1920, but plaintiff in error had under the rules until June 7th, 1920, to file a petition for new trial. Such a petition was filed upon June 5th, 1920, and upon June 17th, 1920, *thirty days after the time for presenting a bill of exceptions had expired under the rule,* counsel for plaintiff in error asked for and obtained from the Court an order extending the time for presenting a bill of exceptions. Upon these facts we submit that this Court should have sustained our

motion to strike the entire bill of exceptions, and as there would, in that event, be no ruling before the Court presented for review, as required by the statutes, the judgment should be affirmed.

This question was discussed at length at pages 22 to 38, inclusive, of our printed Brief, and we think the authorities there cited fully sustain our contention. Thus in the case of *Oxford and Coast Line R. R. Co.* v. *Union Bank,* 82 C. C. A. 609 (4th Circuit), 153 Fed. 723, the Court makes the following statement:

> "However, in the district in which this case was tried there is a rule of Court which only allows twenty days in which to prepare and file a bill of exceptions. Notwithstanding this rule, the Court had the power to extend the time in which to prepare and file a bill of exceptions, *provided it did so within twenty days, but, once the Court permitted the twenty days to expire, then it no longer had the power to extend the time, and the case would stand just as though the term had expired.*" (Our italics.)

In the case of *Russo-Chinese Bank* v. *National Bank,* 109 C. C. A. 398, 187 Fed. 80, the order extending the time recited that it was for good cause shown, and in other cases the filing of a motion or petition for new trial before the expiration of the time has been held to justify an extension. In the case at bar the motion for new trial was filed long after the time had expired, and it could not operate to revive the Court's jurisdiction over the bill of exceptions. Other cases in this connection are:

Philadelphia etc. Co., 218 U. S. 255, 54 L. Ed. 1031;

Dalton v. *Hazelet*, 105 C. C. A. 99, 182 Fed. 561.

In the former case the Supreme Court of the United States held that where the time had expired before the extension all the proceedings were *coram non judice* and void. In the latter case this Court said at page 568:

> *"When the order was made the time for filing exceptions had long since expired and the Court had no authority to extend the time."*

WHEREFORE, your petitioner respectfully requests that a rehearing may be granted in this case.

Respectfully submitted.

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We hereby certify that the foregoing petition for rehearing is not filed for delay and in our opinion is well founded in point of law.

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